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Spousal Testimony in Pennsylvania

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I. Introduction

Society has a right to every person's evidence.[1] This principle, effectuated by the "great power of testimonial compulsion,"[2] reflects society's need to ascertain all relevant facts in the search for truth—the underlying aim of our adversary judicial system.[3] But this principle is not an absolute rule; instead, a balancing of interests occurs. Society's interest in the search for truth is weighted against its interest in the protection and continuation of certain relationships.[4] When society's interest in one of these relationships is deemed more important than its interest in the search for truth, an exception is created to the rule of testimonial compulsion.[5]

Pennsylvania recognizes both statutory and judicial exceptions to the rule of testimonial compulsion. Statutory exceptions offer special protection to the husband-wife,[6] attorney-client,[7] physician-patient[8] and accountant-client[9] relationships. In addition, confidential communications to news reporters,[10] clergymen,[11] licensed psycholo-

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1. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); United States v. Bryan, 339 U.S. 323, 331 (1950). *See* United States v. Nixon, 418 U.S. 683, 710 (1974). "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE].

2. United States v. Bryan, 339 U.S. 323, 331 (1950).

3. Justice Frankfurter once wrote,

> The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

4. *Id.* The balancing approach is also acknowledged in United States v. Bryan, 339 U.S. 323 (1950).

5. *See generally* 8 WIGMORE, *supra* note 1, §§ 2190-2197.

6. 42 PA. CONS. STAT. ANN. §§ 5913-5915, 5923-5927 (Purdon 1981).

7. *Id.* §§ 5916, 5928; Loutzenhizer v. Doddo, 436 Pa. 512, 260 A.2d 745 (1970); *In re* Berger Estate, 387 Pa. 425, 128 A.2d 52 (1956); Cohen v. Jenkintown Cab Co., 238 Pa. Super. Ct. 456, 357 A.2d 689 (1976). *See generally* 8 WIGMORE, *supra* note 1, §§ 2290-2329.

8. 42 PA. CONS. STAT. ANN. § 5929 (Purdon 1981) (applying to civil proceedings only). *See generally* 8 WIGMORE, *supra* note 1, §§ 2380-2391.

9. PA. STAT. ANN. tit. 63, § 9.11(a) (Purdon Supp. 1981).

10. 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1981).

11. *Id.* § 5943. *See generally* 8 WIGMORE, *supra* note 1, §§ 2394-2396.

gists,[12] sexual assault counselors,[13] and school personnel[14] are exempted from the rule of testimonial compulsion. Judicial exceptions include a limited privilege protecting trade secrets[15] and a privilege protecting informers.[16] One exception, the privilege against self-incrimination, is both constitutionally and statutorily mandated.[17]

Two separate and distinct exceptions based upon the marital relationship are recognized in Pennsylvania.[18] The first exception is an incompetency rule that prevents spouses from testifying *against* each other during the existence of a valid marriage.[19] The other exception is a *privilege* that prevents testimonial disclosure of confidential marital communications over the objection of either party.[20] The purpose of this comment is to examine both of these exceptions and to determine whether they continue to meet society's needs.

II. Incompetency of Spouses to Testify Against Each Other

A. Historical Background

1. Origin.—The exact origin of the common-law marital incompetency rule is unknown. According to at least one commentator, however, the incompetency rule was preceded by a testimonial privilege held by married couples, which existed by 1580.[21] This privilege may have had its beginnings in early Roman law, when the rule of *testimonium domesticum* prevented testimonial compulsion in certain situations.[22]

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12. 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1981).

13. Amendment to the Act of Nov. 25, 1970, Act No. 169, 1981 Pa. Legis. Serv. — (to be codified at 42 PA. CONS. STAT. § 5945.1). *See* Comment, *Rape Victim-Rape Crisis Counselor Communications, A New Testimonial Privilege*, 86 DICK L. REV. 601 (1982).

14. *Id.* § 5945.

15. *See* Huessener v. Fisher & Marks Co., 281 Pa. 535, 127 A. 139 (1924) (common-law protection against divulging a trade secret unless the demands of justice require disclosure).

16. *See* Commonwealth v. Carter, 427 Pa. 53, 233 A.2d 284 (1967) (court assumed, without deciding, that the Commonwealth has a limited right to refuse to identify its informers).

17. U.S. CONST. amend. V; PA. CONST. art. I, § 9; 42 PA. CONS. STAT. ANN. § 5941 (Purdon 1981).

18. Commonwealth v. Borris, 247 Pa. Super. Ct. 260, 265, 372 A.2d 451, 453-54 (1977).

19. 42 PA. CONS. STAT. ANN. §§ 5913, 5924 (Purdon 1981). *See* notes 20-120 and accompanying text *infra*.

20. 42 PA. CONS. STAT. ANN. §§ 5914, 5923 (Purdon 1981). *See* notes 121-166 and accompanying text *infra*.

21. 8 WIGMORE, *supra* note 1, § 2227 at 211.

22. *See* Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1969-70). According to Coburn,

> the early Roman law recognized the rule of *testimonium domesticum* which provided that parents, children, patrons, freeman [*sic*], and slaves were prohibited by the *Lex Iulia* from being compelled to give testimony against each other. The rationale underlying this privilege was not directly related to self-incrimination but rather against the corruption of the intra-familial relations which would ensure by making uncertain and suspicious what was instinctively assumed to demand the most unrestricted confidence or *uberrima fides*, the sanctity of the family based on mutual fidelity. Thus, it is not surprising that the specific policy of *uberrima fides* was consistently deemed superior to the general policy of the law, *i.e.*, the correct settlement of controversies or the punishment of offenders.

Nevertheless, the rule that spouses could not testify for or against each other was well established by the early 1600s.[23] American courts adopted this rule as part of the common law,[24] and Pennsylvania applied the marital incompetency rule, without any modification, until 1870.[25] Although the rule itself remained essentially unchanged from its origin until the late nineteenth century, the reasons advanced for its existence varied as the law underwent changes.

2. Rationale.—The justification for the marital incompetency rule can be divided into three categories—unity of identity, interest, and public policy. Unity of identity, a common-law concept that presumed the husband and wife to be one,[26] was advanced by Lord Coke in 1628 as a reason for the incompetency rule.[27] Coke's rationale reflected the religious view of marriage as creating "two souls in one flesh."[28] Since the wife had no separate legal existence,[29] her individual testimony was excluded.[30]

Closely tied to the concept of unity of identity was the common-law rule of disqualification by interest.[31] Courts reasoned that those persons who had an interest in the case, especially a pecuniary interest, were particularly susceptible to the temptation of perjury;[32] therefore, all interested persons, including parties, were excluded from the witness stand.[33] Since the party to the action was disqualified on the ground of interest, the party's spouse was also disqualified, because the spouses' interests were considered one and the same.[34]

Id. at 602 n.16.

23. E. COKE, A COMMENTARY UPON LITTLETON 6b (1628); 2 J. WIGMORE, EVIDENCE § 600 (Chadbourn rev. 1979) [hereinafter cited as 2 WIGMORE].

24. *See, e.g.,* Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839); Lessee of Snyder v. Snyder, 6 Binn. 483 (Pa. 1814).

25. In 1870 the incompetency rule, which absolutely disqualified spousal testimony, was modified to permit spouses to testify *for* each other in civil proceedings. Yeager v. Weaver, 64 Pa. 425 (1870).

26. At common law the wife's identity merged with that of her husband. This concept is no longer considered valid in Pennsylvania. *See, e.g.,* Hack v. Hack, — Pa. —, —, 433 A.2d 859, 864 (1981) (rejecting unity of identity as a basis for interspousal tort immunity).

27. E. COKE, A COMMENTARY UPON LITTLETON 6b (1628).

28. *Id.*

29. Hack v. Hack, — Pa. —, —, 433 A.2d 859, 864 (1981).

30. Pennsylvania considered the husband and wife as being but one witness. Sower v. Weaver, 78 Pa. 443 (1875). This fiction was formally abrogated in Guernsey v. Froude, 13 Pa. Super. Ct. 405 (1900).

31. Disqualification of favorable spousal testimony first occurred in the early seventeenth century, when interest became a disqualification. 2 WIGMORE, *supra* note 22, § 600.

32. Benson v. United States, 146 U.S. 325, 335-36 (1892). At common law the courts disqualified witnesses when they had any reason to believe a witness might lie, for example, being a party to the action, sharing interests with a party, having been convicted of a crime, or being devoid of religious beliefs. *Id. See generally* 2 WIGMORE, *supra* note 22, §§ 575-587.

33. *Id.* § 576.

34. *Id.* § 600.

Although the rule of incompetency based solely on interest was later abrogated,[35] the spousal incompetency rule survived. Instead of justifying the rule on grounds of unity of identity or interest, the courts came to rely primarily on the public policy rationale.[36] Courts reasoned that public policy favored the protection and preservation of marital relationships,[37] a societal interest that outweighed society's interests in the search for truth and the fair administration of justice.[38] Societal interests favoring the marital relationship were recognized in 1736, when Lord Hardwicke wrote, "The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families . . . ."[39] Thus, although the public policy of preserving marital relationships may have been a reason for the courts' recognition of the marital incompetency rule even in early common-law times, it was not until the demise of the disqualification-by-interest rule that public policy became the primary, if not the sole, justification for the rule of marital incompetency.

American courts adopted Lord Hardwicke's interpretation of public policy. The United States Supreme Court reflected the view of American courts when, in *Stein v. Bowman*,[40] it stated,

> This [marital incompetency] rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.[41]

3. Statutory Enactment.—Nineteenth century statutes affected the incompetency rule. Husbands and wives became "admissible" witnesses in England in 1853,[42] with exceptions pertaining to crimi-

35. The Pennsylvania Legislature removed the broad common-law testimonial disqualification of interested persons in the Act of April 15, 1869, P.L. 30, No. 31, § 1.

36. *See, e.g.,* United States v. Crow Dog, 3 Dak. 106, 14 N.W. 437 (1882), *rev'd on other grounds,* 109 U.S. 556 (1888). *See generally* 2 WIGMORE, *supra* note 22, § 619.

In Kelley v. Proctor, 41 N.H. 139 (1860), the New Hampshire Supreme Court recognized that the incompetency rule had a compound justification, founded partly in interest and unity of identity principles, and partly upon considerations of public policy. Consequently, when disqualification by interest was removed, public policy provided an adequate basis for the marital incompetency rule. *Id.* at 143.

37. *See* Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839) (recognizing public policy grounds for the common-law marital incompetency rule in the federal courts).

38. *See* note 4 and accompanying text *supra*. The court in Barbat v. Allen, 155 Eng. Rep. 1092 (Ex. 1852), acknowledged that society's interest in the administration of justice is outweighed by its interest in preserving marital relationships.

39. Barker v. Dixie, 95 Eng. Rep. 171 (K.B. 1736).

40. 38 U.S. (13 Pet.) 209 (1839).

41. *Id.* at 223.

42. Evidence Amendment Act, 1853, 16 & 17 Vict., c. 83, § 1.

nal proceedings and communications.[43] In 1869 the Pennsylvania Legislature removed the broad common-law testimonial disqualification of interested persons,[44] but the marital incompetency rule remained essentially intact. The Pennsylvania Supreme Court's interpretation of the 1869 act in *Yeager v. Weaver*,[45] allowing favorable spousal testimony in civil cases,[46] resulted in the first change in Pennsylvania's absolute rule of spousal incompetency.

In 1887 the Pennsylvania Legislature followed *Yeager* and entirely eliminated the part of the common-law marital incompetency rule that excluded favorable spousal testimony.[47] Since parties to the action were no longer excluded from the witness stand because of interest,[48] exclusion of spousal testimony on the same grounds no longer seemed appropriate.[49] The United States Supreme Court recognized this logic when, in removing the common-law bar of favorable spousal testimony in federal courts, it stated that "a refusal to permit the wife upon the ground of interest to testify on behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity."[50]

The 1887 legislation in Pennsylvania brought about a fundamental change in the judicial approach to spousal testimony; competency became the rule and incompetency the exception.[51] Courts interpreted the 1887 legislation to be an enabling act.[52] Nevertheless, the exceptions to the competency rule proved to be larger than the rule itself. Adverse spousal testimony was still excluded, except in a few narrowly drawn situations.[53] The Pennsylvania Legislature elected not only to continue the common-law rule that disqualified adverse spousal testimony, but also to "reinforce and guard [it] from

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43. *Id.* §§ 2-3.

44. Act of April 15, 1869, P.L. 30, No. 31, § 1. *See* notes 34-38 and accompanying text *supra*. *See also* Estate of Grossman, 486 Pa. 460, 406 A.2d 726 (1979).

45. 64 Pa. 425 (1870).

46. *Id.* at 427. The Pennsylvania Supreme Court held in *Yeager* that the legislature clearly intended that husbands and wives should be competent witnesses for, but not against, each other. *Id.*

47. Act of May 23, 1887, P.L. 158, No. 89, § 1. *See* Commonwealth v. Moore, 453 Pa. 302, 312, 309 A.2d 569, 574 (1973) (Pomeroy, J., dissenting). Favorable spousal testimony is admissible in all criminal and civil proceedings in Pennsylvania. 2 G. HENRY, PENNSYLVANIA EVIDENCE § 780 (4th ed. 1953) [hereinafter cited as 2 HENRY].

48. *See* note 43 and accompanying text *supra*.

49. Funk v. United States, 290 U.S. 371 (1933).

50. *Id.* at 381.

51. *See* Commonwealth v. Clanton, 395 Pa. 521, 527, 151 A.2d 88, 92 (1959).

52. *See, e.g., In re* Brown's Estate, 131 Pa. Super. Ct. 463, 467, 200 A. 940, 941-42 (1938). An enabling act is the "[t]erm applied to any statute enabling persons or corporations to do what before they could not. It is applied to statutes which confer new powers." BLACK'S LAW DICTIONARY 472 (5th ed. 1979).

53. The common-law rule that rendered spouses incompetent to testify against each other was incorporated into the Act of May 23, 1887, P.L. 158, No. 89, §§ 2(b), 5(c). *See generally* 2 HENRY, *supra* note 46, § 780.

invasion by statutory enactment."[54] This 1887 legislation remains the foundation of current law.

B. Current Law Prohibiting Adverse Spousal Testimony

Sections 5911[55] and 5921[56] of the Pennsylvania Judicial Code[57] establish the rule that all persons are competent witnesses in criminal and civil proceedings. Additionally, the Code delineates several exceptions to the general rule of competency,[58] including those exceptions based on the marital relationship.[59] Sections 5913[60] and 5924(a)[61] provide that spouses are neither competent nor permitted

54. Canole v. Allen, 222 Pa. 156, 159, 70 A. 1053, 1055 (1908).
55. 42 PA. CONS. STAT. ANN. § 5911 (Purdon 1981).
56. *Id.* § 5921.
57. *Id.* §§ 101-9781.
58. *See* notes 7-9, 10-13 & 16 *supra*.
59. *See* note 6 *supra*.
60. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981) states,

> Except as otherwise provided in this subchapter, in a criminal proceeding husband and wife shall not be competent or permitted to testify against each other, except that in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor children in their care or custody, or in the care or custody of either of them, each shall be a competent witness against the other, and except also that either of them shall be competent merely to prove the fact of marriage, in support of a criminal charge of bigamy alleged to have been committed by or with the other.

Pennsylvania is one of only six states which provide that one spouse is incompetent to testify against the other in a criminal proceeding. *See* HAWAII REV. STAT. § 621-18 (Supp. 1975); IOWA CODE § 662.7 (1950); OHIO REV. CODE ANN. § 2945.42 (Baldwin Supp. 1980); TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979); WYO. STAT. § 1-12-104 (1977).

Sixteen states provide a privilege against adverse spousal testimony vested in both spouses or in the defendant spouse alone. *See* ARIZ. REV. STAT. ANN. § 13-4062 (1978); COLO. REV. STAT. § 13-90-107 (1973); IDAHO CODE § 9-203 (Supp. 1981); MICH. STAT. ANN. § 27A.2162 (1976); MINN. STAT. ANN. § 595.02 (West Supp. 1981); MISS. CODE ANN. § 13-1-5 (Supp. 1979); MO. ANN. STAT. § 546.260 (Vernon 1953); MONT. REV. CODES ANN. § 46-16-212 (1979); NEB. REV. STAT. § 27-505 (1979); NEV. REV. STAT. § 49-295 (1979); N.J. STAT. ANN. § 2A:84A-17 (West Supp. 1981); OR. REV. STAT. § 44.040 (1979); UTAH CODE ANN. § 78-24-8 (1977); VA. CODE § 19.2-271.1 (Supp. 1981); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1981); W. VA. CODE § 57-3-3 (1966).

Ten states and the District of Columbia entitle the witness-spouse alone to assert a privilege against adverse spousal testimony. *See* ALA. CODE § 12-21-227 (1975); ALASKA R. CRIM. PROC. § 26(b)(2) (1968); CAL. EVID. CODE § 970 (West 1966); CONN. GEN. STAT. ANN. § 54-84a (West Supp. 1981); D.C. CODE ANN. § 14-306 (1973); GA. CODE ANN. § 38-1604 (1981); KY. REV. STAT. ANN. § 421.210 (Baldwin 1969); LA. REV. STAT. ANN. § 15:461 (West 1981); MD. CTS. & JUD. PROC. CODE ANN. §§ 9-101, -106 (1974); MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1981); R.I. GEN. LAWS § 12-17-10 (1970).

Eighteen states have abolished the privilege in criminal cases. *See* ARK. STAT. ANN. § 28-1001, R. EVID. 501, 504 (1979); DEL. CODE ANN. tit. 11, § 3502 (1979); FLA. STAT. ANN. §§ 90.501, .504 (West 1979); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd Supp. 1981); IND. CODE ANN. §§ 34-1-14-4, 35-1-31-3 (Burns 1973); KAN. STAT. ANN. § 60-407 (1976); ME. REV. STAT. ANN. tit. 15, § 1315 (1980); N.H. REV. STAT. ANN. § 516.27 (1974); N.M. R. EVID. 501, 505 (1978 & Supp. 1981); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 1971); N.Y. CIV. PRAC. LAW § 4502 (McKinney 1963); N.C. GEN. STAT. § 8-57 (Supp. 1979); N.D. R. EVID. 501, 504 (Supp. 1979); OKLA. STAT. ANN. tit. 12, §§ 2103, 2501 (West 1980); S.C. CODE § 19-11-30 (1977); S.D. COMPILED LAWS ANN. § 19-13-1 (1979); TENN. CODE ANN. § 40-2404 (1975); VT. STAT. ANN. tit. 12, § 1605 (1973); WIS. STAT. § 905.01 (1975).

61. 42 PA. CONS. STAT. ANN. § 5924(a) (Purdon 1981) states, "In a civil matter neither husband nor wife shall be competent or permitted to testify against each other."

to testify against each other in criminal and civil proceedings. Although the Code deals with criminal and civil proceedings separately, the rule of spousal incompetency is essentially the same for both proceedings.

1. Scope.—Sections 5913 and 5924(a) are truly incompetency statutes; they prohibit adverse spousal testimony regardless of the spouses' desires.[62] In this respect, the marital incompetency rule is broader than any other exception to the general rule of testimonial compulsion recognized in Pennsylvania.[63]

A valid marriage is the only prerequisite for invocation of the marital incompetency rule.[64] "The test is not whether the parties to an allegedly lawful marriage believe they are lawfully married; the test is whether *in law* they are legally married."[65] Moreover, the burden is on the objecting party to prove incompetency.[66] Since the question of competency is a matter of law, it is to be decided by the judge, unless factual issues are present.[67]

Spouses are incompetent witnesses only while married; they become competent upon divorce[68] or death.[69] Furthermore, they are only incompetent "*to testify* against each other."[70] Spouses may be used as sources of evidence against each other.[71] The Pennsylvania

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62. Canole v. Allen, 222 Pa. 156, 159, 70 A. 1053, 1055 (1908).

63. *See* notes 7-16 and accompanying text *supra*.

64. Commonwealth v. Jones, 224 Pa. Super. Ct. 352, 307 A.2d 397 (1973) (testimony of an *alleged* common-law wife was admissible). The testimony of a paramour is not incompetent, 8 WIGMORE, *supra* note 1, § 2230 at 223, nor are partners in a bigamous marriage incompetent. *Id.* § 2231, at 224.

For the beneficial and detrimental aspects of extending the privilege against adverse spousal testimony to those couples not lawfully married, see Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?*, 1977 ARIZ. S.L.J. 411.

65. Commonwealth v. Clanton, 395 Pa. 521, 528, 151 A.2d 88, 92 (1959). In *Clanton* the wife was a competent witness against her second husband because she had never divorced her first husband before her remarriage.

66. *Id.*; Commonwealth v. Mudgett, 174 Pa. 211, 34 A. 588 (1896). The defendant-spouse has the burden to rebut the presumption that favors competency. Commonwealth v. Carey, 105 Pa. Super. Ct. 362, 365, 161 A. 410, 411 (1932). Moreover, that burden is not met by mere allegations that a valid marriage exists. Commonwealth v. Walton, 245 Pa. Super. Ct. 169, 172, 369 A.2d 347, 349 (1976), *rev'd on other grounds*, 483 Pa. 588, 397 A.2d 1179 (1979).

67. Commonwealth v. March, 248 Pa. 434, 94 A. 142 (1915); Commonwealth v. Mudgett, 175 Pa. 211, 34 A. 588 (1896); Commonwealth v. Carey, 105 Pa. Super. Ct. 362, 161 A. 410 (1932).

68. Commonwealth v. Peluso, 240 Pa. Super. Ct. 330, 337, 361 A.2d 852, 856, *rev'd on other grounds*, 481 Pa. 641, 393 A.2d 344 (1978).

69. Huffman v. Simmons, 131 Pa. Super. Ct. 370, 377, 200 A. 274, 277 (1938). *See generally* 8 WIGMORE, *supra* note 1, § 2237.

70. 42 PA. CONS. STAT. ANN. §§ 5913, 5924(a) (Purdon 1981) (emphasis added). *See* notes 59 & 60 *supra*.

71. *See* Commonwealth v. Wilkes, 414 Pa. 246, 251, 199 A.2d 411, 413, *cert. denied*, 379 U.S. 939 (1964); Kine v. Foreman, 205 Pa. Super. Ct. 305, 209 A.2d 1 (1965) (spouse was competent to testify to income tax records, even though testimony might be adverse to other spouse).

The distinction between testifying and providing evidence against the other spouse is important. *See, e.g., In re* Rover, 377 F. Supp. 954 (E.D. Pa. 1974), *aff'd*, 500 F.2d 1300, *cert. denied*, 419 U.S. 1106 (1975). Evidence provided by one spouse introduced against the other

Supreme Court, for example, held that a wife's actions did not constitute "the giving of testimony" when she gave letters, which had been written by her husband to another woman, to another person who in turn gave them to the police.[72]

Although the incompetency statutes generally apply to all criminal and civil proceedings,[73] one proceeding apparently exempt from their application is the mental health hearing. In 1979 the Pennsylvania Superior Court, in *Commonwealth ex rel. Platt v. Platt*,[74] held that a spouse who testifies at a mental health hearing for involuntary commitment of the other spouse is not testifying against the other within the meaning of the incompetency statutes.[75] In addition to the exemption concerning mental health hearings, certain other exemptions serve to limit the effect of the marital exception to the rule of testimonial compulsion.[76] In essence, they are exceptions to the exception, limited situations in which the marital exception does not apply because the legislature or the courts have decided that the search for truth outweighs the need to preserve marital relationships.

2. Exceptions to the Marital Incompetency Rule.—What may be the oldest exception to the marital incompetency rule is codified in section 5913[77] of the Judicial Code,[78] which pertains to criminal proceedings only. Section 5913 provides that spouses are competent witnesses "in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other."[79] This exception to the incompetency rule originated in *Lord Audley's Case*[80] in 1631. Lord Mansfield, commenting on this exception a

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by means other than the testimony of that spouse is admissible. *Id.* at 955. Thus, a spouse who furnishes handwriting samples is not an incompetent source of evidence against the other spouse. *Id.*

72. Commonwealth v. Wilkes, 414 Pa. 246, 251, 199 A.2d 411, 413, *cert. denied*, 379 U.S. 939 (1964).

73. 2 HENRY, *supra* note 46, § 780. "The public policy of preserving the marital relationship is not dependent upon the type of judicial proceedings . . . ." State v. Schier, 47 Or. App. 1075, —, 615 P.2d 1147, 1149 (1980) (the marital privilege is available in a probation revocation proceeding).

74. 266 Pa. Super. Ct. 276, 404 A.2d 410 (1979).

75. *Id.* at 282, 404 A.2d at 413. The appellant-wife contended that the lower court improperly committed her to a hospital for involuntary emergency psychiatric treatment. According to the appellant, her husband's testimony should have been excluded at the commitment hearing because of the marital incompetency rules barring adverse spousal testimony. The superior court rejected her argument. The court stated, "*Assuming that he is acting in good faith* the very purpose of his testimony is not to do something adverse to his wife but to help her obtain the help that she needs." *Id.* (emphasis added).

76. *See* notes 76-107 and accompanying text *infra*.

77. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981).

78. *Id.* §§ 101-9781.

79. *Id.* § 5913. *See* note 59 *supra*.

80. 3 How. St. Tr. 402 (1631). In *Lord Audley's Case* the House of Lords tried Lord Audley as a principal in the second degree for a rape upon his wife. Since the wife was the party wronged, the House of Lords allowed her testimony. Otherwise, the Lords reasoned, she might have been abused again.

century and a half later, wrote,

> There never has been an instance either in a civil or criminal case where the husband or wife has been permitted to be a witness for or against each other, except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance the wife would otherwise be exposed without remedy to personal injury.[81]

As Lord Mansfield explained, this exception is based only on necessity.[82] Like the common-law exception, Pennsylvania's current law requires "bodily injury or violence attempted, done or threatened"[83] upon the spouse. Spouses victimized by nonviolent, nonphysical crimes committed by their spouses are not rendered competent by this provision.

The Pennsylvania Legislature extended the necessity exception in 1909 when it passed an amendment to the 1887 statute.[84] The 1909 amendment[85] provided that spouses are competent to testify in cases of violence against minor children of both or either spouse[86] and minor children in their custody.[87] Thus, defenseless children are

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81. Bentley v. Cook, 99 Eng. Rep. 729, 729 (K.B. 1784).

According to the court in Reeve v. Wood, 122 Eng. Rep. 867 (Q.B. 1864), the necessity exception, which permitted adverse testimony from a victimized spouse, "arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was, in reality the prosecuting party." *Id.* at 868. Failure to recognize this exception would result in an injustice to the victim-spouse. 8 WIGMORE, *supra* note 1, § 2239 at 242. Moreover, once one spouse physically abuses the other, the domestic peace, which the incompetency rule attempts to foster, is already destroyed. *See* Soule's Case, 5 Me. 407 (1828).

82. *See* notes 79 & 80 and accompanying text *supra*.

83. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981). The provision in section 5913 permitting a victim-spouse to testify is a re-enactment of the Act of May 23, 1887, P.L. 158, No. 89, § 2(b). *See* note 52 and accompanying text *supra*. *See generally* 8 WIGMORE, *supra* note 1, § 2239.

At common law the necessity exception, which allowed victim-spouses to testify, was narrowly drawn to include little more than corporal brutalities. *Id. But see* United States v. Allery, 526 F.2d 1362 (8th Cir. 1975), in which the court noted that "[a]n 'offense against the other' has been broadly interpreted to include any personal wrong done to the other, whether physically, mentally or morally injurious." *Id.* at 1365. *Accord*, Wyatt v. United States, 362 U.S. 525 (1960).

84. Act of May 23, 1887, P.L. 158, No. 89, § 2(b).

85. Act of April 27, 1909, P.L. 179, No. 126, § 1.

86. The federal courts recognized an exception to permit adverse spousal testimony in child-abuse cases in United States v. Allery, 526 F.2d 1362 (8th Cir. 1975). The court put forth the following reasons for its decision: (1) a serious crime against a child is an offense against society and destroys family harmony; (2) parental testimony is necessary in prosecutions for child abuse; (3) justice demands the discovery of truth; (4) a crime against a child is a wrong against the other spouse; and (5) the trend among states is to recognize an exception to allow spousal testimony in cases of child abuse and neglect. *Id.*

States that do not have a statutory provision similar to Pennsylvania's have liberally construed related statutes to allow adverse spousal testimony in cases of child abuse. *See, e.g.*, O'Loughlin v. People, 90 Colo. 368, —, 10 P.2d 543, 546 (1932) (husband's murder of his stepdaughter was "a crime committed by one [spouse] against the other"); Chamberlain v. State, 348 P.2d 280, 282 (Wyo. 1960) (husband's rape of his daughter was a "crime committed by one spouse against the other").

87. *See* Commonwealth v. Cathcart, 51 Pa. D. & C.2d 403 (C.P. Del. 1970) (wife was a competent witness against her husband, who allegedly raped their four-year-old niece).

protected by the testimony of the nonassaulting parent. This provision is now included within section 5913.[88]

Another exception to the rule of marital incompetency, arguably just an extension of the necessity exception,[89] is the "same-criminal-episode"[90] exception. As the name indicates, the same-criminal-episode exception is applicable only to criminal proceedings. The Pennsylvania Superior Court enunciated the exception in *Commonwealth v. Galloway*.[91]

> [T]he spouse of an accused is competent under [section 5913 of the Judicial Code] to testify against the defendant as to a crime committed against a third person when such crime occurs in the *same criminal episode* as an act of violence committed by the accused upon the spouse, regardless of whether separate criminal proceedings are involved.[92]

The same-criminal-episode exception was first recognized by the Pennsylvania Supreme Court in *Commonwealth v. Robinson*.[93]

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88. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981). *See* note 59 *supra*. For a case applying this exception, see Commonwealth *ex rel.* Barnowsky v. Maroney, 414 Pa. 161, 199 A.2d 424 (1964). In *Maroney*, the Pennsylvania Supreme Court upheld the lower court's decision to allow adverse testimony by defendant's wife over the defendant-husband's objection. The husband, who allegedly shot and killed their eighteen-year-old son, contended that because the victim-son was eighteen years of age, he was no longer a minor child, and consequently the wife was an incompetent witness. The court held, however, that an eighteen-year-old is not an adult; therefore, the wife was competent.

89. *See* notes 77-82 and accompanying text *supra*.

90. Commonwealth v. Galloway, 271 Pa. Super. Ct. 305, 310, 413 A.2d 418, 421 (1979).

91. *Id.* In *Galloway* the defendant-husband allegedly assaulted and pointed a deadly weapon at his wife. Immediately thereafter he initiated a fight with a male friend of his wife. As the wife fled to call the police, the husband allegedly shot the man. The husband was charged with murder. The trial court nolle prossed the charges resulting from the defendant-husband's attack on his wife. In a separate trial for the murder of the third party, the trial court refused to allow the wife's testimony. The Commonwealth appealed and the superior court, applying the decision in Commonwealth v. Robinson, 468 Pa. 575, 364 A.2d 665 (1976), reversed, holding that the same-criminal-episode test applies even though the defendant-spouse is tried in separate proceedings. *See* notes 92 & 93 and accompanying text *infra*.

92. Commonwealth v. Galloway, 271 Pa. Super. Ct. 305, 312, 413 A.2d 418, 421 (1979) (emphasis added).

93. 468 Pa. 575, 364 A.2d 665 (1976). In *Robinson* a jury convicted the appellant-husband of murder in the first degree, two counts each of assault and battery, and assault and battery with intent to kill in the shootings of his estranged wife and her employer. In addition to testifying about the attack on her, the appellant's wife also testified to acts directed against the other two victims. The appellant contended that this was error, but the Pennsylvania Supreme Court sustained the trial court and allowed the wife's testimony because all the attacks occurred at the same time and place. *Id.* at 585-86, 364 A.2d at 670-71. This holding represents a significant extension of the necessity exception, which was originally designed to protect only the victim-spouse. *See* notes 76-82 and accompanying text *supra*.

The *Robinson* court found persuasive the "single criminal event" test enunciated by the New Jersey Supreme Court in State v. Briley, 53 N.J. 498, 251 A.2d 442 (1969). New Jersey's single event test is as follows:

> If there is a *single criminal event* in which [the wife] and others are targets or victims of the husband's criminal conduct in the totality of the integrated incident and formal charges are made against the husband for some or all the offenses committed (one of which charges is for an offense against the spouse), the wife should be a competent and compellable witness against her husband at the trial of all the cases *regardless of whether they are tried separately or in one proceeding.* And, in this connection it should be immaterial that the offense against the wife does not reach the same dimensions of criminality as it does against the third-party victim.

Although the defendant-spouse in *Robinson* had been tried in a single proceeding for attacks against his wife and third parties, the Pennsylvania Superior Court in *Galloway* held that as long as the crimes occur in the same episode, the victim-spouse is competent in all subsequent proceedings relating to the event.[94] Thus, as a result of the *Robinson* and *Galloway* decisions, the current necessity exception to the marital incompetency rule is broader than the common-law rule.

An additional exception to the marital incompetency rule enables a spouse whose character or conduct is attacked by the other spouse to testify in rebuttal. This exception applies to criminal[95] and civil[96] proceedings. In criminal proceedings the attacking spouse must be the defendant. In civil proceedings, however, the spouse who attacks the other spouse's character or conduct need not be the defendant;[97] the other spouse is competent to rebut provided either spouse is a party to the action.[98] Furthermore, to be competent in either a criminal or civil proceeding, the spouse's character or conduct need not be directly in issue.[99]

Another exception to the marital incompetency rule applicable to both criminal and civil proceedings is the judicial exception that allows a spouse who acts as an agent for the other spouse to testify against the principal-spouse concerning matters within the scope of the spouse's agency.[100] Hence, the marital relationship is not always a bar to adverse spousal testimony.

Other statutory exceptions in criminal proceedings provide that spouses are competent witnesses "in proceedings for desertion and maintenance,"[101] and "to prove the fact of marriage, in support of a criminal charge of bigamy alleged to have been committed by or with the other."[102] A 1911 amendment[103] added the bigamy provision to the 1877 statute.

Id. at 507, 251 A.2d at 446 (emphasis added). *See also* State v. Thompson, 88 Wash. 2d 518, 564 P.2d 315 (1977) (allowing spousal testimony when murder of wife's paramour was part of same transaction as defendant's assault upon his wife).

94. Commonwealth v. Galloway, 271 Pa. Super. Ct. 305, 312, 413 A.2d 418, 421 (1979).

95. 42 PA. CONS. STAT. ANN. § 5915 (Purdon 1981). Section 5915 is substantially a reenactment of the Act of April 11, 1899, P.L. 41, No. 40, § 2.

96. *Id.* §§ 5925, 5926 (derived from the Act of April 11, 1899, P.L. 41, No. 40, § 1 and the Act of May 8, 1907, P.L. 184, No. 146 § 1.

97. *Id.* § 5915 (limits testimony by a spouse in rebuttal to a criminal proceeding "*brought against* the husband or wife") (emphasis added).

98. *See id.* §§ 5925, 5926.

99. Commonwealth v. Garanchoskie, 251 Pa. 247, 96 A. 513 (1916); Commonwealth *ex rel.* Haines v. Banmiller (No. 2), 19 Pa. D. & C.2d 219 (C.P. Cumb.), *aff'd per curiam*, 398 Pa. 7, 157 A.2d 167 (1959).

100. *See* Barnhart v. Grantham, 197 Pa. 502, 47 A. 866 (1901); 8 WIGMORE, *supra* note 1, § 2240.

101. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981).

102. *Id.*

103. Act of May 11, 1911, P.L. 269, No. 170, § 1.

Additional exceptions to the marital incompetency rule applicable to civil proceedings render spouses competent in actions for divorce,[104] support,[105] and child custody;[106] in actions arising under the Protection from Abuse Act;[107] and in actions brought by either spouse to recover separate property.[108] No other exceptions are recognized in Pennsylvania.

3. Waiver.—Failure to object at trial to the competency of a witness generally constitutes a waiver.[109] When it is unquestioned that the party and witness are lawfully married, however, failure to object does not constitute a waiver.[110] Instead, the trial judge must take notice and prevent the incompetent spousal testimony.[111] Neither connivance by the parties nor indulgence by the court can render the spouse competent.[112] The reason for nonwaiver is that the incompetency statutes[113] provide that spouses are not *permitted* to testify against each other.[114] Nevertheless, when the marriage relationship is not apparent, failure to object at trial does constitute a waiver[115] and the trial judge has no duty to raise the question of competency.[116]

4. Inferences.—Since adverse spousal testimony generally is excluded regardless of the parties' wishes,[117] an inevitable issue concerns the permissible inferences to be drawn by the factfinder from the absence of spousal testimony. In *Commonwealth v. Moore*,[118] a criminal case, the Pennsylvania Supreme Court held that neither the Commonwealth nor the trial judge may comment on the defendant-

104. 42 PA. CONS. STAT. ANN. § 5924(b)(1) (Purdon 1981) (derived from the Act of May 2, 1929, P.L. 1237, No. 430, § 50).

105. *Id.* § 5924(b)(2) (derived from the Act of May 23, 1907, P.L. 227, No. 176, § 1). *See* Commonwealth v. Trimble, 197 Pa. Super. Ct. 644, 180 A.2d 92 (1962).

106. 42 PA. CONS. STAT. ANN. § 5924(b)(3) (Purdon 1981).

107. *Id.* § 5924(b)(4).

108. *Id.* § 5927 (derived from the Act of June 8, 1893, P.L. 344, No. 284, § 4.

109. Commonwealth v. Smith, 278 Pa. Super. Ct. 21, 419 A.2d 1335 (1980).

110. Commonwealth v. Stots, 436 Pa. 555, 558, 261 A.2d 577, 579 (1970); Commonwealth v. Conyers, 238 Pa. Super. Ct. 386, 357 A.2d 569 (1976).

111. Ulrich's Case, 267 Pa. 233, 109 A. 922 (1920); Canole v. Allen, 222 Pa. 156, 70 A. 1053 (1908).

112. Canole v. Allen, 222 Pa. 156, 159, 70 A. 1053, 1055 (1908).

113. 42 PA. CONS. STAT. ANN. §§ 5913, 5924(a) (Purdon 1981).

114. *Id. See* notes 59 & 60 *supra*.

115. Commonwealth v. Stots, 436 Pa. 555, 261 A.2d 577 (1970); Commonwealth v. Conyers, 238 Pa. Super. Ct. 386, 357 A.2d 569 (1976); Commonwealth v. Walton, 245 Pa. Super. Ct. 169, 359 A.2d 347 (1976), *rev'd on other grounds,* 483 Pa. 588, 397 A.2d 1179 (1979) (appellant's failure to raise an objection to testimony of his *alleged* common-law wife at time of trial or in post-verdict motions constituted a waiver). *But cf.* Canole v. Allen, 222 Pa. 156, 159, 70 A. 1053, 1055 (1908) (connivance by the parties cannot evade the marital incompetency rule).

116. Commonwealth v. Stots, 436 Pa. 555, 559, 261 A.2d 577, 579 (1970).

117. *See* note 61 and accompanying text *supra*.

118. 453 Pa. 302, 309 A.2d 569 (1973).

spouse's failure to call the other spouse as a witness.[119] The decision overruled a seventy-eight-year-old precedent.[120] The court reasoned that the whole purpose of the marital incompetency rule would be negated if the inference were allowed to operate.[121] Since the marital incompetency rule is the same for civil proceedings, the holding in *Moore* should apply to civil proceedings, although the supreme court has yet to rule directly on this point.

III. Confidential Marital Communications Privilege

A. Historical Background

The privilege[122] for confidential marital communications appeared in the second half of the seventeenth century, but the privilege as it now exists did not become a separate and distinct rule until the second half of the nineteenth century.[123] This occurred in many jurisdictions at the same time as the marital incompetency rule was being either abolished or transformed into a waivable privilege.[124] Little need for a privilege to safeguard the confidentiality of marital communications existed since all spousal testimony was generally excluded under the marital incompetency rule.

Pennsylvania courts recognized the marital communications privilege as part of the common law.[125] Not until 1853, however, did

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119. *Id.* In *Moore*, the district attorney, over the objection of defense counsel, argued that the defendant's failure to call his wife permitted the jury to draw the inference that her testimony would have been unfavorable. The trial judge's instructions were to the same effect. *Id. See* Commonwealth v. Felder, 233 Pa. Super. Ct. 163, 335 A.2d 827 (1975).

120. Commonwealth v. Moore, 453 Pa. 302, 309 A.2d 569 (1973), expressly overruled Commonwealth v. Weber, 167 Pa. 153, 31 A. 481 (1895), which had been reaffirmed in Commonwealth *ex rel.* Haines v. Banmiller, 398 Pa. 7, 157 A.2d 167 (1959) (unanimous per curiam decision).

121. Commonwealth v. Moore, 453 Pa. 302, 307, 309 A.2d 569, 571 (1973).

Although the Commonwealth may not have the jury draw an inference from the failure of the defendant to call his spouse to testify, it may nevertheless have the opportunity to use the testimony of the defendant's spouse against the defendant. If the defendant has the spouse testify for the defendant, then the Commonwealth, on cross-examination, has an opportunity to elicit adverse spousal testimony. Commonwealth v. Hartung, 156 Pa. Super. Ct. 176, 39 A.2d 734 (1944). Thus the defendant-spouse who calls the other spouse to present favorable testimony runs the risk of adverse spousal testimony on cross-examination. *Id.* The same rule applies to civil proceedings. Yeager v. Weaver, 64 Pa. 425 (1870). *See generally* 2 WIGMORE, *supra* note 22, § 613.

122. A privilege is "[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens." BLACK'S LAW DICTIONARY 1077 (5th ed. 1979). In Pennsylvania, testimonial privileges are waivable, *see* 42 PA. CONS. STAT. ANN. §§ 5916, 5928-5929, 5941-5943 (Purdon 1981), but the marital incompetency rule is not, *see* notes 109-113 and accompanying text *supra*. Awareness of this distinction is essential to an adequate understanding of Pennsylvania's marital exceptions to the general rule of testimonial compulsion.

123. 8 WIGMORE, *supra* note 1, § 2333. The oldest of the confidential communications privileges is the attorney-client privilege, which was recognized during the reign of Elizabeth I in 1577. *Id.* § 2290.

124. *Id.* § 2333. Pennsylvania is one of only six states that still recognize the old common-law marital incompetency rule. *See* note 59 *supra*. All other states either recognize no testimonial exception during the marriage or recognize a privilege in one or both spouses. *See id.*

125. *See, e.g.,* Cornell v. Vanartsdalen, 4 Pa. 364 (1846).

the privilege receive its first official recognition by a legislative body. England's Evidence Amendment Act of 1853[126] included a provision rendering spouses competent but not compellable to testify about confidential communications.[127] Nearly twenty-five years later the Pennsylvania Legislature statutorily recognized the common-law confidential marital communications privilege.[128] The act provided that neither the husband nor the wife were to be "competent or permitted to testify to confidential communication made by one to the other, unless this privilege be waived upon the trial."[129] The same privilege applied to both criminal[130] and civil[131] proceedings.

Since the marital communications privilege claims a shorter history than the marital incompetency rule,[132] the rationale advanced for the privilege does not parallel that of the incompetency rule.[133] By the time the marital communications privilege became separately recognized,[134] disqualification of witnesses for interest was being abolished,[135] and accordingly, statutes removing disqualification for interest had no effect on the marital communications privilege.[136]

The principal justification for the privilege is public policy—the public policy that favors the preservation of harmonious marital relationships.[137] Like the marital incompetency rule and other testimonial privileges, the marital communications privilege resulted from the weighing of society's interest in preserving marriages against the interest in truth and the fair administration of justice.[138] Courts and legislatures generally believe that the privilege is necessary to foster the confidences desired between marital partners.[139]

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126. 16 & 17 Vict., c. 83.

127. *Id.* § 3. *See* C. MCCORMICK, EVIDENCE § 82, at 169 (1954); Comment, *Marital Privileges,* 46 CHI.-KENT L. REV. 71, 72 n.10 (1969). *See also* note 41 and accompanying text *supra*.

128. Act of May 23, 1887, P.L. 158, No. 89, §§ 2(c), 5(b). *See* 2 HENRY, *supra* note 46, § 699.

129. Act of May 23, 1887, P.L. 158, No. 89, §§ 2(c), 5(b).

130. *Id.* § 2(c).

131. *Id.* § 5(b).

132. *See* note 22 and accompanying text *supra*.

133. For the justifications for the marital incompetency rule, see notes 25-40 and accompanying text *supra*.

134. The marital communications privilege became a separate exception to the general rule of testimonial compulsion in the second half of the nineteenth century. 8 WIGMORE, *supra* note 1, § 2333.

135. *See* note 34 *supra*.

136. Hopkins v. Grimshaw, 165 U.S. 342, 349 (1897).

137. *See id.* As stated by the Pennsylvania Superior Court in Hunter v. Hunter, 169 Pa. Super. Ct. 498, 83 A.2d 401 (1951), "[the confidential marital communications privilege] is based on public policy and with a view to preserve the harmony and the confidence of the relationship between husband and wife." *Id.* at 503, 80 A.2d at 403.

138. *See* note 4 and accompanying text *supra*.

139. *See* Hunter v. Hunter, 169 Pa. Super. Ct. 498, 83 A.2d 401 (1951). While eighteen states fail to recognize an incompetency rule or privilege against adverse spousal testimony in criminal cases, *see* note 59 *supra,* all states recognize an incompetency rule or privilege concerning confidential marital communications, *see* note 142 *infra*.

B. *Current Law Governing Disclosure of Confidential Marital Communications*

Current statutory provisions providing for a confidential marital communications privilege in criminal[140] and civil[141] proceedings are substantially re-enactments of the 1887 act.[142] The privilege is the same today as it was then: confidential communications between husband and wife cannot be divulged without the consent of both spouses.[143] Thus, spouses are not absolutely barred from testifying to confidential marital communications; they may testify by waiving the privilege.[144]

The privilege applies to communications made during a lawful

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140. 42 PA. CONS. STAT. ANN. § 5914 (Purdon 1981), which reads, "Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial."

141. *Id.* § 5923. Section 5923 is identical to section 5914, except "civil matter" appears in lieu of "criminal proceeding."

142. *See* notes 127 & 128 and accompanying text *supra*.

143. 2 HENRY, *supra* note 46, § 699. In addition to Pennsylvania, ten other states provide a confidential communications privilege vested in both spouses. *See* CAL. EVID. CODE § 980 (West 1966); FLA. STAT. ANN. § 90.504 (West 1979); LA. REV. STAT. ANN. § 15:461 (West 1981); MICH. STAT. ANN. § 27A:2162 (1976); MISS. CODE ANN. § 13-1-5 (Supp. 1979); NEB. REV. STAT. § 27-505 (1979); N.J. STAT. ANN. § 2A:84A-22 (West 1976); OKLA. STAT. ANN. tit. 12, § 2504 (West 1980); S.D. COMPILED LAWS ANN. §§ 19-13-13, -14 (1979); WIS. STAT. § 905.05 (1975).

Sixteen states provide a confidential communications privilege vested in the "other" or "accused" spouse. *See* ALASKA R. CRIM. P. § 26(b)(2) (1968); ARIZ. REV. STAT. ANN. §§ 12-2232, 13-4062 (1956 & 1978); ARK. STAT. ANN. § 28-1001, R. EVID. 504 (1979); COLO. REV. STAT. § 13-90-107 (1973); IDAHO CODE § 9-203 (Supp. 1981); ME. REV. STAT. ANN. tit. 15, § 1315 (1980); MINN. STAT. ANN. § 595.02 (West Supp. 1981); MONT. REV. CODES ANN. §§ 26-1-802, 46-16-212 (1979); NEV. REV. STAT. § 49.295 (1979); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 1971); N.Y. CIV. PRAC. LAW § 4502 (McKinney 1963); N.D. R. EVID. 504 (Supp. 1979); OR. REV. STAT. § 44.040 (1979); UTAH CODE ANN. § 78-24-8 (1977); VA. CODE § 8.01-398 (1977); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1981); W. VA. CODE § 57-3-4 (1966).

Six states provide a confidential communications privilege vested in the witness-spouse. *See* CONN. GEN. STAT. ANN. § 54-84a (West Supp. 1981); HAWAII REV. STAT. § 621-29 (1968); N.M. STAT. ANN. § 38-6-6 (1978); N.C. GEN. STAT. §§ 8-56, -57 (Supp. 1979); R.I. GEN. LAWS §§ 9-17-13, 12-17-10 (1970), *construed in* State v. Angell, — R.I. —, 405 A.2d 10 (1979); S.C. CODE § 19-11-30 (1977).

Three states provide a confidential communications privilege for the communicator. *See* ALA. CODE § 12-21-227 (1975), *construed in* Arnold v. State, 353 So. 2d 524 (Ala. 1977); GA. CODE ANN. § 38-418 (1981); KAN. STAT. ANN. § 60-428 (1976).

Fourteen states and the District of Columbia provide that a spouse is incompetent to testify about confidential communications. *See* DEL. CODE ANN. tit. 11, § 3502 (1979), *construed in* Duonnolo v. State, 397 A.2d 126 (Del. 1978); D.C. CODE ANN. § 14-306 (1973); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd Supp. 1981); IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1980); IOWA CODE § 622.9 (1950); KY. REV. STAT. ANN. § 421.210 (Baldwin 1969); MD. CTS. & JUD. PROC. CODE ANN. § 9-105 (1974); MASS. GEN. LAWS ANN. ch. 233, § 20 (Supp. 1981); MO. ANN. STAT. § 546.260 (Vernon 1953); N.H. REV. STAT. ANN. § 516.27 (1974); OHIO REV. CODE ANN. § 2317.02 (Baldwin Supp. 1980); TENN. CODE ANN. § 40-2404 (1975), *construed in* McCormick v. State, 135 Tenn. 218, 186 S.W. 95 (1916) and Royston v. State, 450 S.W.2d 39 (Tenn. Ct. Crim. App. 1969); TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979); TEX. REV. CIV. STAT. ANN. art. 3715 (Vernon 1969); VT. STAT. ANN. tit. 12, § 1605 (1973); WYO. STAT. § 1-12-101 (1977).

144. *See* notes 165-66 and accompanying text *infra*.

marriage.[145] Communications made before[146] or after[147] a lawful marriage are not privileged. Once the communications are privileged, however, they are always privileged.[148] The privilege survives divorce[149] or death.[150]

To come within the privilege, communications must be made in confidence and with the intention that they not be divulged.[151] Interspousal communications are presumed to be confidential.[152] Nevertheless, since the essence of the privilege is to protect confidences, when the communication is not made in confidence the reason for the privilege is absent.[153] Since the confidence must also be related to the marital relationship,[154] business discussions between husband and wife are not privileged.[155] Thus, whether a particular communication is privileged depends upon its nature and the surrounding circumstances.[156]

The marital communication privilege generally extends only to verbal or written communications,[157] although some jurisdictions

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145. Commonwealth v. Borris, 247 Pa. Super. Ct. 260, 372 A.2d 451 (1977); 8 WIGMORE, *supra* note 1, § 2335. Communications made during cohabitation without the benefit of legal marriage are not privileged. *Id. Accord,* United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977) (privilege for confidential communication depends upon the existence of a valid marriage as determined by state law), *cert. denied,* 434 U.S. 1045 (1978).

146. Some courts have disallowed the marital communications privilege when the marriage was a sham. *See, e.g.,* United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975) (marriage three days before trial was fraudulent and spurious, entered into in bad faith). "A marriage is a sham 'if a bride and groom did not intend to establish a life together at the time they were married.'" Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) (quoting Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975)).

147. *E.g.,* United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied,* 321 U.S. 794 (1944), *rev'd on other grounds,* United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); 8 WIGMORE, *supra* note 1, § 2335.

148. Hunter v. Hunter, 169 Pa. Super. Ct. 498, 503, 83 A.2d 401, 403 (1951). *Accord,* Pereira v. United States, 347 U.S. 1, 6 (1954); United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977), *cert. denied,* 434, U.S. 1045 (1978). *See generally* 8 WIGMORE, *supra* note 1, §§ 2335, 2341.

149. M. Brock & Co. v. Brock, 116 Pa. 109, 9 A. 486 (1887); Hunter v. Hunter, 169 Pa. Super. Ct. 498, 83 A.2d 401 (1951).

150. Cornell v. Vanartsdalen, 4 Pa. 364, 374 (1846) (common-law rule); Hunter v. Hunter, 169 Pa. Super. Ct. 498, 503, 83 A.2d 401, 403 (1951).

151. Commonwealth v. Darush, 279 Pa. Super. Ct. 140, 420 A.2d 1071 (1980). *Accord,* Commonwealth v. Rough, 275 Pa. Super. Ct. 50, 418 A.2d 605 (1980) (communication was not privileged because the accused husband took no precautions against a third party hearing the conversation, even though the conversation was not overheard).

152. Commonwealth v. Darush, 279 Pa. Super. Ct. 140, 420 A.2d 1071 (1980). *Accord,* Wolfle v. United States, 291 U.S. 7 (1934).

153. Blau v. United States, 340 U.S. 332 (1951); 8 WIGMORE, *supra* note 1, § 2336.

154. Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411, *cert. denied,* 379 U.S. 939 (1964); Commonwealth v. Rough, 275 Pa. Super. Ct. 50, 418 A.2d 605 (1980); 8 WIGMORE, *supra* note 1, § 2336. *See also* Yoder v. United States, 80 F.2d 665 (10th Cir. 1935) (note to wife left in conspicuous place was not confidential).

155. Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411, *cert. denied*, 379 U.S. 939 (1964).

156. Commonwealth v. Darush, 279 Pa. Super. Ct. 140, 420 A.2d 1071 (1980) (wife was accused-spouse's bookkeeper).

157. *See, e.g.,* Pereira v. United States, 347 U.S. 1 (1954). *See generally* 8 WIGMORE, *supra* note 1, § 2337.

have extended the privilege to acts.[158] But not all verbal communications are within the privilege.[159] The Pennsylvania Superior Court recently held that "incoherent mutterings, ravings, or ramblings which do not constitute true communications" are not privileged.[160] The court did not clarify what it meant by "true communications," and this question undoubtedly will be the subject of future litigation.

Implicit in the communications privilege is the requirement that both spouses be involved. The other spouse must have received the communication for the privilege to apply.[161] The presence of a third party when the communication takes place can affect the privileged status of the communication. Knowledge of the presence of a third person destroys the confidentiality of the communication; hence, the privilege does not apply.[162] On the other hand, a communication is no less privileged just because it is overheard by an eavesdropper.[163] The privilege, however, does not affect the eavesdropper's competency to testify.[164] In addition, a spouse's subsequent declarations of a confidential marital communication in the presence of others does not remove the confidentiality of the original communication and the privilege applies.[165]

Because the marital communications privilege is vested in both spouses, the privilege can be exercised by either spouse.[166] Thus, it can be waived either by the witness-spouse's failure to claim it or by the other spouse's failure to object on the ground that the communi-

158. *See, e.g.,* United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976) ("invocation of the privilege requires the presence of at least a gesture that is communicative or intended by one spouse to convey a message to the other"); Menefee v. Commonwealth, 189 Va. 900, 55 S.E.2d 9 (1949) (confidential communications include conduct, acts, signs, and spoken or written words made known because of the marital relation).

159. *See, e.g.,* Seitz v. Seitz, 170 Pa. 71, 32 A. 578 (1895) (boastful and defiant statements of misconduct accompanied by insolent and brutal taunts are not privileged); Commonwealth v. Rough, 275 Pa. Super. Ct. 50, 418 A.2d 605 (1980) (defendant-spouse did not intend communication to be confidential).

160. Commonwealth *ex rel.* Platt v. Platt, 266 Pa. Super. Ct. 276, 283, 404 A.2d 410, 414 (1979).

161. Letters sent but never delivered to the wife were held admissible in Commonwealth v. Bishop, 285 Pa. 49, 131 A. 657 (1926), and Commonwealth v. Smith, 270 Pa. 583, 113 A. 844 (1921). When a defendant-spouse dictated letters to a fellow prisoner and then sent them to his wife, who received them and presumably gave them to the district attorney, the Pennsylvania Supreme Court held that the letters were privileged and inadmissible against the defendant-spouse. Commonwealth v. Fisher, 221 Pa. 538, 70 A. 865 (1908). *Cf.* Wolfle v. United States, 291 U.S. 7 (1934) (letter dictated by stenographer not privileged because communications to a spouse can be made conveniently without compromising confidentiality by using a third person).

162. Dumbach v. Bishop, 183 Pa. 602, 39 A. 48 (1898); Robb's Appeal, 98 Pa. 501 (1881); Commonwealth v. Peluso, 240 Pa. Super. Ct. 330, 361 A.2d 852 (1976), *rev'd on other grounds*, 481 Pa. 641, 393 A.2d 344 (1978).

163. Hunter v. Hunter, 169 Pa. Super. Ct. 498, 83 A.2d 401 (1951).

164. *Id.*

165. Commonwealth v. Peluso, 240 Pa. Super. Ct. 330, 361 A.2d 852 (1976) (citing Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913)). *See generally* 8 WIGMORE, *supra* note 1, § 2339.

166. *See* Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411 (consent of both spouses required for admission of confidential communications testimony).

cation was confidential.[167] The burden is on the marital partners to exercise their privilege.[168]

IV. The Inadequacy of the Marital Testimonial Exceptions in Pennsylvania

The exceptions to the general rule of testimonial compulsion examined above—the marital incompetency rule and the marital communications privilege—are the only exceptions in Pennsylvania based on the marital relationship. Although many states recognize a *privilege* against adverse spousal testimony, otherwise known as the antimarital facts privilege,[169] a similar privilege is not recognized in Pennsylvania because of the incompetency rule. Both recognized marital exceptions are governed by statutes, and these statutes are substantially reenactments of nineteenth century statutes.[170] Unlike courts and legislatures in other jurisdictions,[171] the Pennsylvania Legislature largely retained the common-law marital exceptions.[172] Before these exceptions are evaluated to determine whether they meet society's needs,[173] several influencing factors must first be considered.

A. Considerations in Evaluating Marital Testimonial Exceptions

1. Criticism of Marital Testimonial Exceptions.—Scholars, commentators, and jurists have strongly condemned rules of evidence that render spouses incompetent to testify or bestow a privilege against adverse spousal testimony.[174] Perhaps the most often quoted criticism is from Professor Wigmore's treatise on evidence.

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167. Huffman v. Simmons, 131 Pa. Super. Ct. 370, 381, 200 A. 274, 278 (1938).

168. *But cf.* Commonwealth v. Stots, 436 Pa. 555, 261 A.2d 577 (1970) (failure of spouse to object does not constitute a waiver of the marital incompetency rule).

169. The privilege against adverse spousal testimony is synonomous with the antimarital facts privilege. United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977), *cert. denied,* 434 U.S. 1045 (1978).

170. *See* notes 46, 53, 82, 94, 95, 107 & 127 and accompanying text *supra*.

171. States which no longer adhere to the common-law marital incompetency rule are listed in note 59 *supra*. For comments regarding the trend in state and federal law, see notes 183-188 and accompanying text *infra*.

172. Sections 5913, 5914, 5923, and 5924, which provide for the incompetency rule and communications privilege in criminal and civil proceedings, still reflect the basic common-law rules in force prior to legislative enactment of rules of evidence. *See* notes 59-60 & 139-140 *supra*.

173. *See* note 3 *supra*.

174. *See, e.g.,* Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations,* 13 MINN. L. REV. 675 (1929); Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege,* 61 CAL. L. REV. 353 (1973); 8 WIGMORE, *supra* note 1, § 2228; C. MCCORMICK, EVIDENCE § 83 (1954).

The Kentucky Supreme Court strongly condemned the marital exception to the general rule of testimonial compulsion in Wells v. Commonwealth, 562 S.W.2d 622 (Ky.), *cert. denied,* 439 U.S. 861 (1978). The court stated: "At its very best, the rule that one party to a marriage cannot be compelled to testify against the other . . . is one of the most ill-founded precepts to be found in the common law." *Id.* at 624.

> This privilege has no longer adequate reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice.[175]

In general, criticisms of marital testimonial exceptions attack the balance that has been struck between the conflicting societal needs of preserving the marital relationship and insuring the fair administration of justice.[176] Whether the critics advocate restriction or abolition of marital exceptions, their premise is the same: society's interest in ascertaining the truth should not be outweighed by any policy promoting marital harmony through application of an overly broad exception to testimonial compulsion.[177] Only the marital communications privilege remains relatively free of criticism, although some critics have even advocated limiting its scope.[178]

Not everyone has advocated restricting the testimonial exceptions. Some critics have called for retention of the marital testimonial exceptions,[179] modification of them,[180] or even recognition of new exceptions to the general rule of testimonial compulsion.[181] Considerations in creating the marital testimonial exceptions, such as the inducement to perjury and the potential harm to a preferred relationship, are still recognized as valid reasons for continuing the exceptions.[182] Furthermore, the notion that "persons of even moderate sensibilities must be adversely affected upon observing one spouse compelled to reveal communications made in the intimacy of marriage" retains validity.[183]

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175. 8 WIGMORE, *supra* note 1, § 2228 at 221.

176. *See, e.g.,* State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981). In *Freeman* the defendant exercised the rule of spousal incompetency to exclude evidence of criminal acts committed in public. Under those circumstances, the court believed that the rule was employed "more to thwart the system of justice than to promote family peace." *Id.* at —, 276 S.E.2d at 453.

177. *See, e.g.,* Trammel v. United States, 445 U.S. 40 (1980); State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

178. *See, e.g.,* C. MCCORMICK, EVIDENCE § 83, at 171 (1954).

179. *See, e.g.,* Borden, *In Defense of the Privilege for Confidential Marital Communications,* 39 ALA. LAW. 575 (1978); Louisell, *The Psychologist in Today's Legal World: Part II,* 41 MINN. L. REV. 731, 750 (1957); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 TUL. L. REV. 101 (1956).

180. *See, e.,g.,* Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend,* 38 VA. L. REV. 359 (1952) (recommending that the privilege against adverse spousal testimony be vested in the witness-spouse alone).

181. *See, e.g.,* Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child,* 74 DICK. L. REV. 599 (1969-70); Note, *A Suggested Privilege for Confidential Communication with Marriage Counselors,* 106 U. PA. L. REV. 266 (1957).

182. *See* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 TUL. L. REV. 101 (1956).

183. *Id.* at 111.

2. Trend in Other Jurisdictions.—The trend in state and federal law is to restrict testimonial exceptions based on the marital relationship. Federal law is illustrative. In 1958 the United States Supreme Court in *Hawkins v. United States*[184] rejected a challenge to the federal common-law rule of evidence that vested a privilege against adverse spousal testimony in both spouses.[185] Thus, the Court decided to remain in agreement with the thirty-one state jurisdictions that allowed the accused to prevent adverse spousal testimony.[186] In 1980 the Court reversed its decision in *Hawkins*. In *Trammel v. United States*,[187] the Court held that a privilege against adverse spousal testimony vests in the witness-spouse alone. Consequently, an accused-spouse no longer has the privilege to prevent adverse spousal testimony in federal court.

The Court in *Trammel* recognized the trend in state law since its *Hawkins* decision. No longer did thirty-one states vest a privilege in the accused-spouse; the number had dropped to twenty-four,[188] and the trend continues. In April 1981 the North Carolina Supreme Court modified the common-law rule preventing adverse spousal testimony in criminal proceedings, with the effect that testimonial incompetence extends only to confidential marital communications.[189]

In essence, courts are placing greater weight on the societal need to ascertain truth than on the need to preserve marital relationships.[190] Conceivably this reconsideration stems from the lack of

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184. 358 U.S. 74 (1958).

185. Although he agreed with the Court's judgment in *Hawkins,* Justice Stewart expressed grave doubts about the propriety of the adverse spousal testimony privilege.

> Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely "reason and experience" require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility.

Id. at 81-82 (Stewart, J., concurring) (footnotes omitted).

186. *Id.* at 81 n.3 (Stewart, J., concurring).

187. 445 U.S. 40 (1980). In modifying the privilege against adverse spousal testimony in the federal courts, the Supreme Court continued "the evolutionary development of testimonial privileges in federal criminal trials 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'" *Id.* at 47 (quoting FED. R. EVID. 501).

188. 445 U.S. at 48 & n.9.

189. Freeman v. State, 302 N.C. 591, 276 S.E.2d 450 (1981). *See* notes 175 and 176 and accompanying text *supra*.

190. One result of the courts' emphasis on society's need for evidence is the decision in State v. Crow, 104 Ariz. 579, 457 P.2d 256 (1969). In *Crow* the court construed a statute that disallowed spousal testimony, except for crimes committed by one spouse against the other, to "allow the testimony in all cases in which the crime committed so closely touches or affects the other spouse as to render the reason for the rule—promotion of marital peace and apprehension of marital dissension—inapplicable." *Id.* at —, 457 P.2d at 262. Under this liberal interpretation, the court allowed adverse spousal testimony against a husband who murdered hs father-in-law and brother-in-law. *Id.*

marital permanence while the marital exceptions were in place, as illustrated by high divorce rates.

3. Does—or Should—Competency Mean Compellability?—It is axiomatic that competent witnesses are also compellable witnesses.[191] Thus, when spouses are competent to testify because of an exception to the marital incompetency rule,[192] they are also compellable.[193] An examination of this issue, however, suggests that it is not, or should not be, so easily resolved as most American courts believe.

The Pennsylvania Superior Court in *Commonwealth v. Hess*[194] held that the benefit of a statutory provision abrogating spousal incompetency with respect to victimized spouses[195] extends to the state, and therefore spouses who are competent witnesses as a result of this exception are also compellable witnesses.[196] The court failed to acknowledge, however, that this very narrow exception to the marital incompetency rule[197] is basically a statutory enactment of the common-law rule—a rule originated for the protection of the spouse, not the state.[198] The manifest incongruity in generally prohibiting adverse spousal testimony from a willing spouse while compelling adverse spousal testimony from a nonwilling victimized spouse is apparent. In essence, the witness-spouse is being punished by society for being a victim of a crime. Furthermore, the *Hess* decision conflicts with the public policy rationale for the marital incompe-

191. 8 WIGMORE, *supra* note 1, § 2245(2) at 264. *See* Commonwealth v. Galloway, 271 Pa. Super. Ct. 305, 313, 413 A.2d 418, 422 (1979); State v. Briley, 53 N.J. 498, 505, 251 A.2d 442, 445-46 (1969). The principle that competent witnesses are compellable has been statutorily enacted in Pennsylvania. 42 PA. CONS. STAT. ANN. § 5941(a) (Purdon 1981). Section 5941(a) provides,

> Except defendants actually upon trial in a criminal proceeding, any competent witness may be compelled to testify in any matter, civil or criminal, but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal proceeding, to offer himself as a witness, be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.

192. *See* notes 76-107 and accompanying text *supra*.

193. Commonwealth v. Hess, 270 Pa. Super. Ct. 501, 411 A.2d 830 (1979). *Accord,* State v. Briley, 53 N.J. 498, 251 A.2d 442 (1969); *Ex parte* Moreland, 415 S.W.2d 428 (Tex. Ct. Crim. App. 1967).

194. 270 Pa. Super. Ct. 501, 411 A.2d 830 (1979).

195. The term "victimized spouses" refers to those spouses who have been subjected to "bodily injury or violence attempted, done or threatened" by their spouses. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981). *See* note 78 and accompanying text *supra*.

196. In Commonwealth v. Hess, 270 Pa. Super. Ct. 501, 411 A.2d 830 (1979), the appellant-spouse had been convicted by a jury of simple and aggravated assault, recklessly endangering another person, terroristic threats, and unlawful restraint against his wife. Affirming the testimonial compulsion of the appellant's wife, the court noted that if testimony were contingent upon the discretion of the victimized spouse, "it would materially frustrate the legislative intent of facilitating the prosecution of criminal behavior occurring in a domestic setting frequently devoid of witnesses other than the spouses themselves." *Id.* at 507, 411 A.2d at 833.

197. 42 PA. CONS. STAT. ANN. § 5913 (Purdon 1981).

198. *See* notes 79-82 and accompanying text *supra*.

tency rule, for "[w]here [a spouse] refuses to testify, there is strong evidence that there is still a marital relationship to be protected."[199]

The House of Lords recently considered a case similar to *Hess*. In *Hoskyn v. Commissioner of Police for the Metropolis*[200] the House of Lords had its first opportunity since 1930 to consider *Labsworth's Case*,[201] which had held that a spouse who is a competent witness is also a compellable witness. The House of Lords overruled *Labsworth*. Thus, the wife of a defendant charged with a crime of violence against her was *not* a compellable witness against her defendant-husband.[202]

Lord Wilberforce rejected the idea that competency and compellability are coextensive. He noted that the word "compellability" was of comparatively recent origin and that the principles are separate and should not always be read as "competent *and therefore* compellable."[203] Speaking of the marital privilege, he said, "[T]he considerations which led the law to treat [the wife] as competent do not in any way weaken the force of the principle we have stated that a wife ought not to be forced into the witness box, a principle of general application and fundamental importance."[204]

As noted by Lord Wilberforce in *Hoskyn*, the principles of competency and compellability are separate and distinct. American courts have been too simplistic and superficial in their treatment of these concepts. For states like Pennsylvania that still retain the marital incompetency rule, the better view is that competent spouses should not be compellable unless a societal interest beyond the protection of the witness-spouses exists, as it does in child-abuse cases. The same result should apply to states that vest a privilege in the witness-spouse alone. At the very least the decision whether to compel spousal testimony should be recognized for what it is—a policy decision.

4. Are Marital Testimonial Exceptions Constitutionally Mandated?—The marital incompetency rules and testimonial privileges are not rooted in the Constitution, but rather are merely common-law rules of evidence founded upon public policy.[205] No Pennsylvania court has ever based the marital exceptions to the general

199. Wyatt v. United States, 362 U.S. 525, 534 (1960) (Warren, C.J., dissenting).
200. [1978] 2 All E.R. 136.
201. [1930] All E.R. 340.
202. Australian and Canadian courts have also held that a spouse who is rendered competent to testify against the other spouse because they were the victim of a crime of violence is not a compellable witness. *See* Hoskyn v. Commissioner of Police for the Metropolis [1978] 2 All E.R. at 143.
203. *Id.* at 140.
204. *Id.* at 142.
205. *See, e.g.*, United States v. Benford, 457 F. Supp. 589 (E.D. Mich. 1978); United States v. Hicks, 420 F. Supp. 533 (N.D. Tex. 1976).

rule of testimonial compulsion on the Constitution. Arguably, however, the right to privacy[206] is a constitutional guarantee of the marital testimonial privilege.

In 1978 a New York court, in *In re Application of A and M*,[207] accepted the right to privacy as a basis for a parent-child testimonial privilege. The court held that the parents of a sixteen-year-old boy suspected of arson did not have to testify before a grand jury concerning admissions by the child that were made in confidence to a parent. The court balanced the state's interest in the factfinding process against both the state's interest and the individual's interest in preserving the family as a viable institution.[208] The state's interest in factfinding yielded because "communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the 'private realm of family life which the state cannot enter.' "[209]

Subsequent New York cases further defined this newly recognized right to withhold testimony. In *In re Mark G.*[210] the court held that only those statements made to the parent "in confidence and for the purpose of obtaining support, advice or guidance"[211] are privileged. In *People v. Fitzgerald*,[212] however, the court read the constitutional privilege liberally. Thus, the state was precluded from compelling the testimony of a father of an adult son concerning their conversations about an automobile accident.[213] The *Fitzgerald* court

206. *See* Comment, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege,* 56 IND. L.J. 121, 149 (1980) ("Right of privacy considerations, nevertheless, preclude the complete abolition of the marital communication privilege").

The following resource materials provide an excellent study of the right to privacy: S. HOFSTADTER & G. HOROWITZ, THE RIGHT OF PRIVACY (1964); A. WESTIN, PRIVACY AND FREEDOM (1970); Beaney, *The Right to Privacy and American Law,* 31 L. & CONTEMP. PROB. 253 (1966); Gerety, *Redefining Privacy,* 12 HARV. C.R.-C.L.L. REV. 233 (1977); Shils, *Privacy: Its Constitution and Vicissitudes,* 31 L. & CONTEMP. PROB. 281 (1966); Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

207. 61 App. Div. 2d 426, 403 N.Y.S.2d 375 (1978).

208. As the court noted, "The course of constitutional law is filled with instances wherein the interests of the State in achieving a legitimate goal have been balanced against the rights of individual privacy guaranteed by the Constitution." *Id.* at 433, 403 N.Y.S.2d at 380.

209. *Id.* at 435, 403 N.Y.S.2d at 381 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

The court in *In re* Application of A and M bottomed its decision on the right to privacy recognized by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), and reaffirmed in Roe v. Wade, 410 U.S. 113 (1973). Furthermore, the court relied on Moore v. East Cleveland, 431 U.S. 494 (1977), a substantive due process case, to support its contention that the integrity of the family is entitled to constitutional protection. Justice Powell, in his plurality opinion in *Moore,* had written, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04 (footnotes omitted).

210. 65 App. Div. 2d 917, 410 N.Y.S.2d 464 (1978).

211. *Id.* at 917, 410 N.Y.S.2d at 465-66.

212. 101 Misc. 2d 712, 422 N.Y.S.2d 309 (West. Co. Ct. 1979).

213. According to the *Fitzgerald* court, the right to privacy, which guarantees the parent-child testimonial privilege, is derived from the ninth and fourteenth amendments of the United

recognized the tendency of courts to restrict testimonial privileges,[214] but it also recognized that "courts cannot shield themselves behind such a 'tendency' and disregard all such situations where the foundations of certain *basic* relationships, such as those between family members may be threatened."[215]

To date, New York stands alone in its recognition of a constitutional privilege to protect parent-child confidences. At least one Pennsylvania lower court has refused to recognize a constitutional basis for a witness's refusal to testify against his parent.[216] Apparently no state has yet to recognize a marital testimonial privilege founded in the Constitution. Nevertheless, arguments have been advanced for recognition of a constitutional privacy right to shield at least some marital confidences from intrusion by the state.[217] Whether such a constitutional privilege will be recognized or not, many critics agree that the individual's demand for privacy requires recognition of a limited marital testimonial privilege.

B. Evaluating Pennsylvania's Marital Testimonial Exceptions

Since the early common-law justifications for the marital exceptions to the general rule of testimonial compulsion are no longer valid,[218] the decision whether to restrict, abolish, or continue the marital exceptions in Pennsylvania is solely a public policy decision. Society must decide whether the costs of continuing the present rules—costs to the fair administration of justice—are justified in view of the speculative benefits to the marital relationship. An equally important consideration is the potential cost to society in compelling spousal testimony in all cases, without exception. As discussed above, public policy and constitutional arguments militate against a complete abrogation of the marital testimonial exceptions.

Society should consider the dilemma of spouses who are compelled to testify against their will. In effect, they have the following three options: refuse to testify and be held in contempt of court; commit perjury; testify and risk irreparable harm to the marriage

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States Constitution and art. I, §§ 1, 6, of the New York Constitution. *Id.* at 716, 422 N.Y.S.2d at 314.

214. *See* notes 183-189 and accompanying text *supra*.

215. 101 Misc. 2d at 715, 422 N.Y.S.2d at 311.

216. Commonwealth v. Pastirko, 19 Cambria Co. L.J. 231 (Pa. C.P. 1958).

217. *See, e.g.*, Black, *The Marital and Physician Privileges—Reprint of a Letter to a Congressman,* 1975 DUKE L.J. 45; Note, *The Husband-Wife Testimonial Privilege in the Federal Courts,* 59 B.U. L. REV. 894 (1979).

"A possible explanation for interpersonal testimonial privileges is that they are important protectors of the right of privacy. . . . [P]roperly understood and implemented, the simple exclusion of privileged evidence at trial can be viewed as an important and well-designed adjunct to the right of privacy." Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach,* 64 GEO. L.J. 613, 647-48 (1976).

218. *See* notes 34, 43, 48 & 49 and accompanying text *supra*.

they thought was worth saving. On the other hand, society should realistically look at the wisdom in prohibiting adverse testimony by a willing spouse.[219] A marital partner is surely better able to evaluate the viability of a marriage than is a court or legislature.

By prohibiting adverse spousal testimony regardless of the spouse's desires,[220] the Pennsylvania Legislature runs the risk of protecting moribund marriages at the expense of the fair administration of justice. Quite simply, there is no justification for such a broad marital incompetency rule.[221] The goal of preserving viable marriages could be better served by vesting a *privilege* against adverse spousal testimony in the witness-spouse alone.[222] Under such a privilege, society would still offer protection to viable marital relationships, but would no longer needlessly exclude voluntary testimony in cases in which no marriage exists to preserve.

Total abrogation of the marital exceptions, however, would result in an intolerable intrusion into the marital relationship.[223] The value of spousal testimony would not justify an unrestrained intrusion into the intimacies of the marital relationship. The current law as reflected in *Commonwealth v. Hess*[224] is such an intrusion because it conflicts with the public policy of preserving viable marriages, and therefore should be changed. Ample reason exists for allowing a physically abused spouse to testify against the accused-spouse; no overriding reason justifies compulsion of such testimony.[225] Only certain circumstances may justify an unwelcomed intrusion into the marital relationship. Society's interest in protecting abused children, for example, undoubtedly outweighs its interest in protecting a marriage that condones such abusive acts.

The legislature's decision to bestow a privileged status on confidential marital communications[226] should be reevaluated especially if the incompetency rule is abolished. In this event, a privilege should be vested in the witness-spouse alone. Again, the protection

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219. *See* Wyatt v. United States, 362 U.S. 525, 534 (1960) (Warren, C.J., dissenting). The Chief Justice noted that a spouse's refusal to testify indicates the existence of a viable marriage; conversely, a spouse's willingness to testify should indicate the existence of a marriage not worthy of protection.

220. *See* note 61 and accompanying text *supra*.

221. The lack of adequate justification for the common-law incompetency rule still retained by Pennsylvania is illustrated by the very few number of states that continue to recognize the rule. The vast majority of the American jurisdictions no longer recognize a total bar to adverse spousal testimony. *See* note 59 *supra*.

222. Trammel v. United States, 445 U.S. 40, 53 (1980).

223. The harm to the human personality, and hence to freedom, outweighs any benefit to the administration of justice derived from total abrogation of testimonial privileges. Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 750 (1957).

224. 270 Pa. Super. Ct. 501, 411 A.2d 830 (1979). The *Hess* holding allows testimonial compulsion when the spouse is competent. *See* notes 193-197 and accompanying text *supra*.

225. *See* State v. Todd, 173 La. 23, 136 So. 76 (1931); Hoskyn v. Commissioner of Police for the Metropolis [1978] 2 All E.R. 36.

226. *See* notes 124-127 and accompanying text *supra*.

offered by vesting a privilege in the witness-spouse would provide adequate safeguards against excessive intrusion by the state, but at the same time a willing spouse could testify. Furthermore, such a change would have no effect on the marital relationship. Not even avid proponents of the privilege suggest that marital communications are made with knowledge of and reliance on a testimonial privilege.[227] Elimination of the communications distinction would also have the added benefit of uniformity since the same rule could apply to all spousal testimony.

V. Conclusion

Undeniably, the marriage institution does not retain the same lofty status today that it enjoyed in the nineteenth century when the Pennsylvania Legislature enacted the common-law marital exceptions to the general rule of testimonial compulsion. Nevertheless, the general proposition that society should favor the preservation of marital relationships is still presumed valid. Because of societal changes and the increased need to ascertain all relevant facts in the administration of justice, Pennsylvania's marital testimonial exceptions no longer meet the needs of society. The exclusion of testimony from willing spouses is simply not justified. On the other hand, while a marital testimonial privilege may not be necessary to preserve marital relationships, it is essential to preserve the realm of family privacy that the state cannot invade. Control over the revelation of information related to the intimacies of marriage is a right to be enjoyed by all free people. By vesting a privilege in the witness-spouse alone for all spousal testimony, except in child-abuse cases, the Pennsylvania Legislature could simultaneously enhance society's ability to administer justice and continue to protect viable marriages.

GEORGE E. CORNELIUS

227. *See* notes 178-180 *supra*.